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Introduction

Openness in government has been a widely sought goal of the press and of various groups and individuals representing the public interest in recent decades.[1] Federal and state legislation requiring governmental agencies to hold open meetings is among the most important means to achieve this goal of protecting the people's "right to know." Public awareness of and participation in governmental processes have long been viewed as essential to truly representative democracy. For example, James Madison expressed this philosophy in terms that dramatize the necessity of making governmental functions visible to the public:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.[2]

Open meeting laws seek to expose to public scrutiny not merely the final product of the labors of governing bodies but the decision-making process itself: "If an informed citizenry is to meaningfully participate in government or at least understand why government acts affecting their daily lives are taken, the process of decision making as well as the end results must be conducted in full view of the governed."[3] In addition, it has been argued that open meeting laws, to achieve maximum effectiveness, should cover most governmental entities:

> Every meeting of any board, commission, agency or authority . . . should be a marketplace of ideas, so that the governmental agency may have sufficient input from the citizens who are going to be affected by the subsequent action. . . . Government, more so now than ever before, should be responsive to the wishes of the public. These wishes could never be known in nonpublic meetings, and the governmental agencies would be deprived of the benefit of suggestions and ideas which may be advanced by the knowledgeable public.[4]

[1] *See* Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199 (1962) [hereinafter cited as Note, *Open Meeting*] for an excellent discussion of the role played by the press in the early efforts toward greater public accessibility to governmental processes.

[2] 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910) (letter to W.T. Barry, Aug. 4, 1822), *quoted in* Branzburg v. Hayes, 408 U.S. 665, 723 (1972) (dissenting opinion of Douglas, J.).

[3] Oklahoma Ass'n of Mun. Atty's v. State, 577 P.2d 1310, 1313-14 (Okla. 1978).

[4] Town of Palm Beach v. Gradison, 296 So. 2d 473, 475 (Fla. 1974).

The Oklahoma legislature first enacted an open meeting statute to attain the goal of openness in government in 1959.[5] The Oklahoma Open Meeting Act,[6] which became effective on October 1, 1977, replaced the 1959 statute that had been amended in 1967[7] and 1971.[8] The new Act represents a vast improvement: important terms are defined for the first time,[9] retained provisions are clarified,[10] provisions implied in the previous versions are specified,[11] and totally new provisions are set forth.[12] This note will detail the many significant differences between the Act and the former amended version in effect from 1971 through 1977.[13] The validity of cases decided under the former statute also will be examined, and the cases interpreting the Act will be discussed. Finally, the Act will be compared with the federal "Government in the Sunshine Act"[14] and possible amendments to the Act will be suggested.

Provisions of the Former Statute Retained in the New Act

The fundamental requirements of the present Act also were in the former statute, which, like its predecessors,[15] attempted to achieve broad coverage with general language. As a result, the former versions were brief and left many issues to judicial interpretation. In the new Act, the legislature has incorporated the substance of the earlier language while supplying detail for the sake of clarity and effectiveness.

The new Act has, of course, retained the general concept that all meetings of public bodies are to be open to the public.[16] The term, "public body," is again defined in broad terms[17] but with several additions to the list of specified groups.[18] Voting must be in public sessions and all votes are to be recorded.[19]

Executive sessions, that is, parts of meetings not open to the public, are permitted for meetings relating to the "employment, hiring, appointment, promotion, demotion, disciplining or resignation"[20] of any employee, but the general requirement that votes be publicly cast and recorded applies also to

[5] 25 OKLA. STAT. §§ 201, 202 (Supp. 1959).
[6] 25 OKLA. STAT. §§ 301-14 (Supp. 1979).
[7] 25 OKLA. STAT. §§ 201 (Supp. 1970).
[8] 25 OKLA. STAT. §§ 201, 202 (1971).
[9] See text accompanying notes 32-33, 45, and 49, *infra*.
[10] See text accompanying notes 62-64, *infra*.
[11] See text accompanying note 25, *infra*.
[12] See text accompanying notes 30, 34-41, 46-48, 65-66, 71-77, *infra*.
[13] 25 OKLA. STAT. §§ 201, 202 (1971).
[14] 5 U.S.C. § 552b (1976).
[15] Discussed in sources cited at notes 1, 2 *supra*.
[16] 25 OKLA. STAT. § 303 (Supp. 1980).
[17] *Id.* § 304(1).
[18] *Id.*
[19] *Id.* § 305.
[20] *Id.* § 307.

matters discussed in executive session.[21] Any legislative member who serves on a committee with jurisdiction over a public body may attend executive sessions of that body.[22]

The penalties set forth under the former statute have been retained, with some modification. Under particular circumstances actions taken in willful violation of the Act may be invalidated,[23] and the individuals may be subject to fines or imprisonment or both.[24]

New Provisions in the 1977 Act

Policy and Definitions

At the outset the Act succinctly states the policy behind the principle of public access: "It is the public policy of the State of Oklahoma to encourage and facilitate an informed citizenry's understanding of the governmental processes and governmental problems."[25] The Act continues with many new provisions, several modifications, and a number of definitions that attempt to avoid vagueness and confusion.

The former statute had simply listed the groups intended to be covered. The 1977 Act goes further. The definition of "public body" in the new Act borrows heavily from the former language, *e.g.*, "governing bodies of all municipalities," "boards of county commissioners," "boards of public and higher education," and "all boards, bureaus, commissions, agencies, trusteeships, authorities . . ." have been retained together with the qualification that these groups must be "supported in whole or in part by public funds or entrusted with the expending of public funds, or administering public property."[26] This coverage is quite expansive; bodies that would not normally be perceived as public bodies are included because they are supported "in part" by public funds or entrusted with expending public funds.[27] Section 304 of the new Act goes even further, however, by including "councils, committees, public trusts, task forces, or study groups" within the definition and by providing that all committees and subcommittees of public bodies are included.[28] The Act does, however, limit its coverage somewhat by excluding certain groups. The term, "public body," does not include "the state judiciary or the State Legislature or administrative staffs of public bodies, including, but not limited to, faculty meetings and athletic staff meetings of institutions of higher education."[29] The remaining subsections of section 304 provide a general definition of a "meeting" and then identify

[21] *Id.*
[22] *Id.* § 310.
[23] *Id.* § 313.
[24] *Id.* § 314.
[25] *Id.* § 302.
[26] *Id.* § 304(1).
[27] Weis, *The Oklahoma Open Meeting Act*, 49 OKLA. B.A.J. 1515, 1516 (1978).
[28] 25 OKLA. STAT. § 304(1) (Supp. 1980).
[29] *Id.*

particular kinds of meetings: regularly scheduled meetings, special meetings, emergency meetings, and continued or reconvened meetings. These distinctions are significant with respect to notification requirements of impending meetings that were enacted as part of the new law.[30]

Notice Requirements

The requirement of notice to the public of all meetings covered by the statute is noteworthy. Without knowledge of the time and place of meetings, the public is unlikely to participate in a meaningful way. Thus, the notice provisions are essential to fulfilling the statutory goal of public access. Requirements of notice are so important that the Supreme Court of Minnesota has held that they were implied in the open meeting law of that state:

> The critical question is what constitutes a meeting open to the public, as required by the statute. It is the judgment of this court that a meeting of which the public is unaware is not such a meeting. To constitute a public meeting, there must be adequate, timely notice to the public of the time and place of the meeting. The statute itself does not expressly require such advance notice to the public. However, the general rule of statutory construction is that every statute is understood to contain by implication, if not by its express terms, all provisions necessary to effectuate its object and purpose. The language of the statute directing that meetings be open to the public is meaningless if the public has no knowledge that the meeting is to take place. Therefore, we believe that the statute, by implication, requires adequate notice of the time and place of the meeting. The mere fact that the meeting-room door is unlocked is not sufficient compliance with the directive of the statute [citation omitted].[31]

The Act carefully delineates the specific notice requirement for each kind of meeting. In general a "meeting" is defined as "the conducting of business of a public body by a majority of its members being personally together."[32] With respect to regularly scheduled meetings,[33] all public bodies are to give written notice of this kind of meeting for each calendar year by December 15 of the preceding year.[34] These written notices are to be filed with the secretary of state,[35] the county clerk,[36] or the municipal clerk,[37] depending upon the type of governmental body.

[30] *Id.* §§ 303, 311.

[31] Sullivan v. Credit River Township, 299 Minn. 170, 217 N.W.2d 502, 505-506 (1974).

[32] 25 OKLA. STAT. § 304(2) (Supp. 1980).

[33] *I.e.*, "a meeting at which the regular business of the public body is conducted." *Id.* § 304(3).

[34] *Id.* § 311(1).

[35] *Id.* § 311(2).

[36] *Id.* § 311(3).

[37] *Id.* § 311(4).

In each instance the official to whom the notice is given is required to maintain a register of all notices received and to make this information available on request.[38] In addition to the advance public notice in writing, twenty-four hours[39] before any regularly scheduled meetings a public notice is to be displayed at the principal office or meeting place of the public body announcing the meeting and listing the agenda.[40] Matters discussed at these meetings are to be limited to agenda items and to any other items that come under the limited concept of "new business."[41]

Circumstances occassionally will necessitate the convening of public bodies to handle emergencies or to deal with other matters that may require action on relatively short notice. The Act provides for both "special meetings" and "emergency meetings," and sets notice requirements designed to strike a balance between the necessity of action by the public body and the policy of public access.[42]

The Act defines "emergency" as: "a situation involving injury to persons or injury and damage to public or personal property or immediate financial loss when the time requirements for public notice of a special meeting would make such procedure impractical and increase the likelihood of injury or damage or immediate financial loss."[43] In an emergency situation the ordinary notice requirements are waived; the person calling the meeting is required only to give such notice "as is reasonable and possible."[44]

For less critical situations, the special meeting is available. A "special meeting" is defined simply as "any meeting of a public body other than a regularly scheduled meeting or emergency meeting."[45] Notice of a special meeting is to be given to the proper official[46] in writing, in person, or by telephone, at least forty-eight hours before the meeting.[47] The date, time, place, and agenda are to be posted at the principal office or the meeting place at least twenty-four hours before the meeting, and only those matters appearing on the posted agenda may be discussed in the meeting. No "new business" is permitted.[48]

[38] *Id.* § 311(7).

[39] Excluding Saturdays, Sundays, and legal holidays.

[40] 25 OKLA. STAT. § 311(a) (Supp. 1980). Three recent Oklahoma cases have recognized the importance of the posting of the agenda to the overall purpose of the Act. See Author's Note following the Conclusion.

[41] *Id.* "New business" is defined as "any matter not known about or which would not have been reasonably foreseen prior to the time of posting."

[42] See text accompanying notes 43-48, *infra.*

[43] 25 OKLA. STAT. § 304(5) (Supp. 1980).

[44] *Id.* § 311(12).

[45] *Id.* § 304(4).

[46] As set out in 25 OKLA. STAT. § 311(1-6) (Supp. 1980).

[47] *Id.* § 311(11). This subsection specifies that Saturdays, Sundays, and legal holidays are not counted in the provisions for posting twenty-four hours prior to special meetings. Apparently weekends and holidays may be counted in the forty-eight hours notice requirements.

[48] *Id.*

The final category of meetings is the continued or reconvened meeting. Any meeting may be adjourned and reconvened provided the time and place for reconvening are announced at the meeting being adjourned.[49] A "continued or reconvened meeting," according to the Act, is "a meeting which is assembled for the purpose of finishing business appearing on an agenda of a previous meeting."[50] Only items listed on the agenda of the meeting that was adjourned and reconvened may be considered at the reconvened meeting.[51] The precise language of this section appears to forbid the discussion in a reconvened meeting of any item raised as "new business" in a regularly scheduled meeting because the "new business" would not have been on the original agenda. This apparent restriction may be desirable and more practical than first appears. The matters raised as "new business" in the adjourned meeting could be addressed in a special meeting if necessary; notice of the topics could be given, thus allowing for full consideration of the matter within a reasonably short time without sacrificing notification to the public.

Prohibitions Against Circumvention

Another important addition to the Act is the prohibition against circumvention. Section 306 provides: "No informal gatherings or any electronic or telephonic communications among a majority of the members of a public body shall be used to decide any action or to take any vote on any matter."[52] This section explicitly declares a policy that courts in other jurisdictions have reached by statutory interpretation. A California court noted in 1968 that requirements of prior open meeting statutes had often been evaded by "unannounced 'sneak' meetings and through indulgence in euphemisms such as executive session, conference, caucus, study or work session, and meeting of the committee as whole."[53] The court then declared that the objectives of the open meeting statute dictated that informal gatherings closed to the public be prohibited:

> An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.[54]

This language was subsequently quoted with approval by the Supreme Court

[49] *Id.* § 311(10).
[50] *Id.* § 304(6).
[51] *Id.*
[52] *Id.* § 306.
[53] Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480, 487 (1969).
[54] *Id.*, 69 Cal. Rptr. at 487.

of Florida, which added that Florida's open meeting statute "should be construed so as to frustrate all evasive devices."[55]

Section 306 of the Oklahoma Act removes any doubts about the applicability of its provisions of "informal" gatherings. Some latitude for judicial interpretation, however, may still remain in that informal gatherings are proscribed only if used to "decide any action" or to take a vote.[56] This raises the question of the meaning of "to decide." One can argue that any informal conference among a majority of members is prohibited. This is consistent with the overall purpose of the Act. No motivation would seem to exist for conferences if not "to decide" an issue or at least to make progress toward a decision. Support for this interpretation of the statute can be found in a case from the Second District Court of Appeals of Florida. Faced with a similar issue in interpreting Florida's open meeting law,[57] which, by its terms, applied to meetings "at which official acts are to be taken,"[58] the court held that:

> [I]t is the entire *decision-making process* that the legislature intended to affect by the enactment of the statute before us. . . . Every step in the decision-making process . . . is a necessary preliminary to formal action. It follows that each step constitutes an 'official act' . . . within the meaning of the act.[59]

Although this precise question has not come before the Oklahoma Supreme Court, an indication has been given that the justices are inclined to give a broad interpretation to the phrase "to decide any action" and to interpret section 306 liberally.[60] Nevertheless, the statute could have been and should be more carefully worded in order to avoid unnecessary confusion.

Exceptions to Public Meeting Requirements

The Act has clarified the purpose for which executive sessions were permitted under the former statute and has added two new categories of exceptions.[61] The language of the former statute (which allowed executive sessions for personnel matters) evidently was the source of some confusion as opinions of the state attorney general were requested on several occasions.[62] These opinions held that the exception applied only to matters regarding individual employees and did not apply to groups of employees or to independent contractors.[63] The new Act codifies these rulings by specifying that matters per-

[55] Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974).

[56] 25 OKLA. STAT. § 306 (Supp. 1980).

[57] FLA. STAT. § 286.011 (1975).

[58] Times Pub. Co. v. Williams, 222 So. 2d 470 (Fla. Dist. Ct. App. 1969).

[59] *Id.* at 473 (emphasis in original).

[60] *See* Berry v. Board of Governors of Registered Dentists, 611 P.2d 628 (Okla. 1980), discussed *infra* at text accompanying notes 135-144.

[61] 25 OKLA. STAT. § 307 (Supp. 1980).

[62] Weis, *supra* note 27, at 1519.

[63] 8 Op. Att'y Gen. 3 (Okla. No. 75-102); 7 Op. Att'y Gen. 235 (Okla. No. 74-235); 5 Op. Att'y Gen. 231 (Okla. No. 72-233).

taining to "individual salaried" public officers or employees may be the subject of executive sessions.[64] The Act provides that an executive session may be conducted only upon a public vote by a majority of the present members of the public body.[65]

A new exception to the public meeting requirement has been created for district boards of education that are considering the expulsion or suspension of a student, when a closed meeting is requested by the student, the parent or guardian, or their attorney.[66] Another exception also pertains to district boards of education. The boards are allowed to meet in executive session when discussing negotiations "concerning employees and representatives of employee groups."[67] This category (in contrast to that permitting executive sessions for hiring, firing, or disciplining of individual employees in order to protect reputations) allows closed meetings apparently for financial reasons. Open salary negotiations might be injurious to the public by resulting in disproportionately generous increases for the affected employees because of the handicap to the public body of being unable to plan strategy in private as employees' representatives may do.[68] If this line of reasoning is sound, and support does exist for it,[69] then it would seem to be appropriate for any negotiations between public bodies and groups of employees, not just for boards of education. Oklahoma grants the right to bargain collectively to firefighters and to police[70] as well as to teachers.[71] No reason is apparent for allowing negotiations with representatives of teachers to be in private while requiring that negotiations with representatives of police and firefighters be in public. If sound reasons do not exist for this distinction, an amendment to the Act might be in order to reach a consistent result.

Legislative Exemption

Although the legislature expressly exempted itself from the provisions of the Act by excluding the legislature from the definition of public bodies,[72] the Act also directs that: "The Legislature shall conduct open meetings in accordance with rules to be adopted by each house thereof."[73] As the legislature is the ultimate body "entrusted with the expending of public

[64] 25 OKLA. STAT. § 307 (Supp. 1980).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See generally In re* Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972), discussed in Wickham, *Let the Sun Shine In*!, 68 NW. U.L. REV. 480, 491-92 (1973).

[69] The court, in *In re* Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972), noted that the lower court had the benefit of "impressive, uncontroverted testimony by respectable national authorities in the field, that meaningful collective bargaining . . . would be destroyed if full publicity were accorded at each step of the negotions." *Id.* at 426.

[70] 11 OKLA. STAT. § 51-103 (Supp. 1980). See Author's Note following Conclusion for discussion of a recent case relevant to this point.

[71] 70 OKLA. STAT. § 509.2 (Supp. 1980).

[72] 25 OKLA. STAT. § 304(1) (Supp. 1980).

[73] *Id.* § 309.

funds,"[74] it is enigmatic that the legislature should have excluded itself from the coverage of the Act and its policies. Whatever might have been anticipated at the time of the Act's passage, the legislature has not to date adopted rules governing public access to meetings of committees and subcommittees. On the other hand, the legislature has sought to open up the governor's office by providing that: "Any meeting between the Governor and a majority of the members of any public body shall be open to the public and subject to all other provisions of this act."[75]

The Act also requires that minutes be taken at each meeting that show the steps taken to comply with the notice provisions, the members present and those absent, all matters discussed, and, in the case of emergency meetings, the nature of the emergency.[76] The minutes are to be made available to the public.[77] Whether this section pertains to executive sessions is unclear. Although the language appears to include executive sessions by requiring minutes for "each meeting," one can argue that application of this requirement to executive sessions is hardly in keeping with the purpose of executive sessions, especially if the records are available to the public.

Remedial Provisions

Finally, the Act modifies the remedial provisions of the former statute. The section setting the punishment for violation of the former statute was never amended after its enactment in 1959.[78] Under that section violators would be guilty of a misdemeanor, subject to a maximum fine of one hundred dollars, or a maximum period of confinement in the county jail of thirty days, or both.[79] These penalties are sharply increased under the current law. The maximum fine is five hundred dollars and the maximum jail term is one year.[80] Significantly though, both sanctions under the current Act may be assessed only for *willful* violations.[81] Similarly, the portion of the former statute that provided for invalidation of actions taken in violation of the Act's requirements has been amended to apply only to actions taken in *willful* violation.[82]

Criminal penalties and invalidation have been criticized by commentators as ineffective, or too harsh, or both. One writer expressed the view that even modest criminal sanctions were too harsh because of the vagueness and ambiguities generally found in open meeting laws.[83] Another stated that the penalties typically authorized were too light to have deterrent value and

[74] *Id.* § 304(1).
[75] *Id.* § 308.
[76] *Id.* § 312.
[77] *Id.*
[78] 25 OKLA. STAT. § 202 (Supp. 1959).
[79] *Id.*
[80] 25 OKLA. STAT. § 314 (Supp. 1980).
[81] *Id.*
[82] *Id.* § 313.
[83] Note, *Open Meeting, supra* note 1, at 1211.

that careful research had failed to disclose a single instance in which a public official had actually been sentenced under such statutes.[84] Furthermore, Oklahoma's former statute was criticized for authorizing criminal sanctions for any violations without regard to intent.[85] These criticisms, however, appear to be inapplicable to the new Act, which is carefully drafted to avoid vagueness or ambiguity. In addition, the increased penalties should have a deterrent effect, and only willful violations are subject to the penalties.

Similar objections have been voiced to the invalidation remedy: "[T]he deterrent effect of invalidation may seriously be doubted, for the officials who violate the statute will seldom be affected by the consequences of such a remedy."[86] This view assumes an official disinterest that is probably not justified. More to the point are arguments that invalidation is unduly harsh in some cases because of an overriding public interest in the certainty of official actions,[87] and because reconsideration of a decision in a subsequent open meeting may only result in an affirmation of the prior decision.[88] These concerns raise valid questions that indicate a need for further consideration of this section of the Act.

Effect of the Act on Prior Case Law

Under the former statute five substantive cases were decided by the Oklahoma Supreme Court.[89] Two of the cases dealt with the general requirement of public voting and recordation of votes and appear to be unaffected by the new Act. In one of the cases, a school board held an open meeting in which the renewal of a teacher's contract was discussed, but the school board failed to comply with the requirement of recording each member's vote.[90] The court affirmed the trial court's decision in favor of the teacher and invalidated the board's action.[91] The vote had been by show of hands only and confusion existed over the exact tally, though the outcome of the vote was undisputed. The court rejected the board's argument that the oversight constituted harmless error: "When the language of a statute is plain and unambiguous, no room for construction exists."[92] The only question raised by this case in terms of the changes embodied in the Act is whether the board's

[84] Wickham, *supra* note 68, at 496. Since publication of that article, criminal penalties have been assessed in at least one unreported Oklahoma case. And see Author's Note, following the Conclusion, for another recent Oklahoma case.

[85] Note, *Legislation: Oklahoma's Open Meeting Law*, 29 OKLA. L. REV 189, 199-200 (1976) [hereinafter cited as Note].

[86] Note, *Open Meeting*, *supra* note 1, at 1214.

[87] *Id.*; Note, *supra* note 85, at 198.

[88] Wickham, *supra* note 68, at 496-98.

[89] This does not include one case in which the court simply ruled that an alleged violation of the open meeting law could not be the basis of an appeal where the issue had not been raised at trial. Martin v. Harrah Indep. School Dist., 543 P.2d 1370 (Okla. 1975).

[90] Oldham v. Drummond Bd. of Educ., 542 P.2d 1309 (Okla. 1975).

[91] *Id.*

[92] *Id.* at 1311.

violation was willful. As this was not an issue under the former statute, one can only speculate as to what finding would have been justified on that point.

In the second of the two cases, the court did find harmless error when a school board met in executive session to discuss a request to reconsider the nonrenewal of a teacher's contract and, after hearing evidence from both sides, the board returned from the executive session to announce that the nonrenewal had been affirmed by a unanimous vote.[93] Undoubtedly, a technical violation of the law occurred by taking the vote in the executive session, but the Oklahoma Supreme Court agreed with the trial court that because all members were present in the public meeting when the vote was announced, the purpose of the statute had been fulfilled: "The purpose of the Open Meeting Law with respect to school boards is to require each member to stand up and be counted so the public may know how he voted on the issue."[94]

The result in both of these cases is sound. Although the error in the first case was not substantial, the affected teacher was deprived of the statutory right to know the position taken by each board member. The error in the second case, however, resulted in no such deprivation, so the result was allowed to stand.

Two other cases decided under the former statute dealt with sub-groups of public bodies. The current status of these cases seems clear in light of the modifications in the new Act's definition of public bodies.[95] In *Sanders v. Benton*,[96] the issue was whether to invalidate the selection of a site for a community treatment center by the Board of Corrections because the board had considered the recommendations of a citizens' advisory committee that had not been formulated in open meetings. The court consulted cases from several other states for guidance on the question of which subordinate groups should be covered by the statute and which should be exempt. The justices finally concluded that groups that are merely advisory should not be subject to the openness requirements.[97] This issue would not arise under the current Act. The definition of "public body" has expressed the intention of including groups like the one in question in *Sanders* by inclusion of "task force or study groups"[98] in the list of specified bodies, as well as by including "all committees or subcommittees of any public body."[99] Therefore, although the decision in *Sanders* may have been correct under the old law, the Act clearly requires a different result today.

[93] Graybill v. Oklahoma Bd. of Educ., 585 P.2d 1358 (Okla. 1978).

[94] *Id.* at 1360 (quoting from the trial court).

[95] 25 OKLA. STAT. § 304(1) (Supp. 1980). The Oklahoma Supreme Court has rejected the author's rationale and has reaffirmed the holding of *Sanders* in a recent decision. See Author's Note following the Conclusion.

[96] 579 P.2d 815 (Okla. 1978).

[97] *Id.*

[98] 25 OKLA. STAT. § 304(1) (Supp. 1980).

[99] *Id.*

On the same day that *Sanders* was decided, the court reached the opposite conclusion with respect to another subordinate group in *Carl v. Board of Regents*.[100] In *Carl*, the court unanimously concluded that the Admissions Board of the University of Oklahoma College of Medicine was required to conduct its business in public sessions.[101] The decision was based on the fact that the board exercised decision-making power, not just advisory power.[102] The same result would be dictated by the new Act.

Although the current status of the above cases seems certain, the continued vitality of a fifth case, *Stillwater Savings & Loan Board*,[103] is questionable. At issue in *Stillwater* was whether the former statute applied to the Savings and Loan Board when it was acting in a "quasijudicial manner." The Oklahoma Supreme Court has defined "quasi-judicial" in these terms: "A quasijudicial power is one imposed upon an officer or a board involving the exercise of discretion, judicial in its nature, in connection with and as incidental to the administration of matters assigned or intrusted to such officers or board."[104] The court has also quoted the following definition formulated by the Supreme Court of Wisconsin:

> Every officer or board that is required, in the administration of the law, to determine whether a duty exists, or determine from facts, by the exercise of judgment, a course of action, within legislative restraints or guides, must necessarily act judicially in a sense. The power often partakes so much of the judicial function that it is spoken of as quasi-judicial.[105]

In *Stillwater*, the appellant, Stillwater Savings and Loan Association, was contesting the action of the Savings and Loan Board in granting to the Ponca City Savings and Loan Association a certificate of authority to establish a branch office in Stillwater.[106] In challenging the board's decision, the appellant alleged that the board had violated the former statute by holding closed hearings on the application for certificate of authority.[107] The court concluded that the board was exempt from the former statute's requirements when holding this kind of session.[108]

In *Stillwater* the court first called attention to the Oklahoma Administrative Procedures Act of 1963[109] and the Savings and Loan Code of 1970,[110]

[100] 577 P.2d 912 (Okla. 1978).

[101] *Id.* at 915.

[102] *Id.*

[103] Stillwater Sav. & Loan Ass'n v. Oklahoma Sav. & Loan Bd., 534 P.2d 9 (Okla. 1975).

[104] Board of County Comm'rs v. Cypert, 65 Okla. 168, 166 P. 195, 198 (1917).

[105] State *ex rel.* Ellis v. Thorne, 112 Wis. 84, 87 N.W. 797, 799 (1901), *quoted in In re* Assessment of Kansas City Southern Ry., 168 Okla. 495, 33 P.2d 772, 776 (1934).

[106] 534 P.2d 9, 10 (Okla. 1975).

[107] *Id.* at 11.

[108] *Id.*

[109] 75 OKLA. STAT. §§ 301 *et seq.* (Supp. 1980).

[110] 18 OKLA. STAT. §§ 381.1 *et seq.* (Supp. 1980).

the latter of which states that the Administrative Procedures Act is to govern proceedings of the board.[111] The opinion then noted that the Administrative Procedures Act contains a phrase that requires that parties to a matter before the board be notified of the board's decisions personally or by mail.[112] The court concluded that the fact that parties could be notified by mail indicated that although the board was to meet in public to hear arguments on each case, the actual decision could be reached in private.[113] The opinion leaves many questions unanswered because the court's reasoning is not fully set forth. As a result, whether the passage of the new Act would sway the court to overrule the *Stillwater* decision is difficult to predict. Furthermore, the opinion does not touch on the question of whether the amendment of the Open Meeting Law in 1971, subsequent to the passage of both other statutes, affected the interrelation of these statutes.

The interrelation of similar statutes has been considered in Florida, a state having a great deal of litigation involving its "Government in the Sunshine Act."[114] In *Canney v. Board of Public Instruction*,[115] the Florida Supreme Court held by a four-to-three vote that there was no exemption for quasi-judicial proceedings. The majority had the aid of a clear expression of legislative intent because proposed amendments to the bill to create such an exemption had been defeated.[116] Nevertheless, a spirited dissent maintained that due process required a "judicial atmosphere"[117] of closed sessions. In *Stillwater*, the Oklahoma Supreme Court chose not to avail itself of this argument. If the justices had, the due process argument could be countered by a 1977 decision of the United States Supreme Court.[118] In considering whether procedures before administrative agencies violated the seventh amendment preservation of right to trial by jury, the Court ruled that Congress had absolute power to determine the method of deciding questions under statutorily created rights.[119] This supports the conclusion of the majority in *Canney* that the legislature does have the power to direct the methods of procedure in quasi-judicial actions.

The intent of the new Act is clear. Section 307 declares: "No public body shall hold executive sessions unless otherwise specifically provided for herein."[120] One could argue that "herein" could be interpreted to refer to the Oklahoma statutes as a whole, instead of just the Act, and hence that the reasoning in *Stillwater*, based on the Administrative Procedures Act, remains

[111] 18 OKLA. STAT. § 381.5 (Supp. 1980).
[112] 75 OKLA. STAT. § 312 (1971).
[113] 534 P.2d 9, 11 (Okla. 1975).
[114] FLA. STAT. § 286.011 (1975).
[115] 278 So. 2d 260 (Fla. 1973).
[116] *Id.* at 263.
[117] *Id.* at 264. The dissent does not specify whether federal or Florida due process is involved.
[118] Atlas Roofing Co. v. OSHA, 430 U.S. 442 (1977).
[119] *Id.* at 450.
[120] 25 OKLA. STAT. § 307 (Supp. 1980).

valid. Although this argument might appear to be too attenuated, it would have been preferable for the section to read "unless otherwise provided for in this section." Because of the Oklahoma Supreme Court's use of policy arguments to close deliberations in quasi-judicial proceedings[121] and the court's apparent failure to communicate clearly the reasoning of the decision, one cannot say whether the *Stillwater* case remains authoritative.

Cases Decided Under the Current Act

Only two cases involving the current Act have been decided by the Oklahoma Supreme Court, but both raise important issues. In the first case, *Oklahoma Association of Municipal Attorneys v. State*,[122] the court held that public bodies may meet in executive session in consultation with their attorneys, but "only if the communications concern a pending investigation, claim, or action, and disclosure of the matters discussed would seriously impair the ability of the public body to process the claim or conduct the pending investigation, litigation or proceeding in the public interest."[123] As in *Stillwater*, the court created a large exception to the Act by reference to other statutes. The reasoning in the *Municipal Attorneys* case is clearer than in *Stillwater*. The court noted that the 1977 Oklahoma legislature had passed the "Privilege Against Disclosure Act,"[124] which, *inter alia*, provided that public officers or agencies enjoyed a privilege against being required to give evidence concerning pending investigations or actions if the testimony would be prejudicial to the public body's ability to carry out the particular activity.[125] The court further observed the strong presumption against repeal by implication of one statute by another when passed in the same session.[126] The court concluded that by passing both statutes in the same session, the legislature must have intended to create the exception for public bodies meeting with their attorneys—an application of the specific over the general.[127]

Although the reasoning in *Municipal Attorneys* is easily followed, the rationale is not persuasive. Even though the presumption against implied repeal is strong, the Act arguably bars all exceptions not specified in section 307. The legislature's intent in this situation is somewhat paradoxical; that is, no reason exists for favoring the court's conclusion over the opposite result. In fact, less support is present for the court's holding because one can argue more easily that the legislature considered the Act as a whole with its express

[121] The strength of this appeal can only be inferred; it is characteristic of the *Stillwater* opinion that the court did not even mention policy considerations.

[122] 577 P.2d 1310 (Okla. 1978).

[123] *Id.* at 1315.

[124] This act was repealed in 1978 when the same language was incorporated into the Evidence Code. It now appears as 12 OKLA. STAT. §§ 2501-502 (Supp. 1980).

[125] *Id.*

[126] 577 P.2d 1310, 1315 (Okla. 1978).

[127] *Id.* at 1315.

limitations on exceptions, than one can argue that they must have considered the interrelation of the Act with all other bills passed during that session.

In concluding that the result in *Municipal Attorneys* is less than persuasive, one should not forget that the policy considerations weighed by the court include relevant factors that should be balanced. These policies were forcefully expressed in a California opinion quoted in *Municipal Attorneys*:

> Public agencies are constantly embroiled in contract and eminent domain litigation and, with the expansion of public tort liability, in personal injury and property damage suits. Large-scale public services and projects expose public entities to potential tort liabilities dwarfing those of most private clients. Money actions by and against the public are as contentious as those involving private litigants. The most casual and naive observer can sense the financial stakes wrapped up in the conventionalities of a condemnation trial. Government should have no advantage in legal strife; neither should it be a second-class citizen. . . .
>
> Settlement and avoidance of litigation are particularly sensitive activities whose conduct would be grossly confounded, often made impossible, by undiscriminating insistence on open lawyer-client conferences. In settlement advice, the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. If the public's "right to know" compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness. A lawyer worth his salt would feel a *sense of treachery* in disclosing that kind of appraisal. (8 Wigmore op. cit. § 2291, p. 553). To him its conduct in public would be shocking, unprofessional, unthinkable. He would prefer to fight the lawsuit to its bitter end. Frustration would blunt the law's policy in favor of settlement, and financial imprudence might be a compelled path.[128]

The California court struggled to find a basis to justify an exception for the attorney-client conferences and concluded that too little evidence was present to support the position that the open meeting requirement had repealed by implication the privileges found in the California Evidence Code.[129]

The relationship between open meetings and the attorney-client privilege was considered with the opposite result in the Florida case of *Times Publishing Co. v. Williams*.[130] Florida's "Government in the Sunshine Law" allowed exceptions to the open meeting requirements only where the state's constitution directed.[131] Consequently, the court was forced to concede that: "[T]he public, acting through the legislature, has waived the privilege with

[128] Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480, 490-91 (1968) (emphasis in original).

[129] *Id.*, 69 Cal. Rptr. at 491.

[130] 222 So. 2d 470 (Fla. Dist. Ct. App. 1969).

[131] *Id.* at 474.

regard to the enumerated public bodies."[132] The court, however, went on to find that the legislature was without authority to interfere with the duties of attorneys, the control of whom was solely vested in the state's supreme court by the constitution. The court, therefore, concluded that an exemption to the statute existed to prevent the attorney from being placed in the position of having to violate either an ethical canon or the open meeting law. The exemption was held, however, to be no broader in scope than required to allow the attorney to follow the ethical canons and to exist only in favor of the attorney, not in favor of the client.[133]

These cases illustrate the great importance attached to the policy arguments in favor of allowing executive sessions for attorney-client conferences.[134] In the final analysis, however, the policy considerations belong with the legislature. If the legislature believes that the value of openness in government dominates, this value judgment should be expressed more clearly than the Act has done.

In the second case under the new Act, *Berry v. Board of Governors of Registered Dentists*,[135] the court limited the holding of *Municipal Attorneys*. In *Berry*, the Board of Governors of Registered Dentists had sought and obtained injunctions against various denturists for allegedly engaging in the unlawful practice of dentistry.[136] The denturists won reversal because the board of governors had violated the Act when it initiated the suits.[137] One board member and the board's attorney had signed the petitions. The board contended that the informality of this decision-making process had exempted it from the coverage of the Act. The court disagreed.[138] In doing so, the justices distinguished the *Municipal Attorneys* case,[139] thereby clarifying the scope of the attorney-client privilege with respect to the Act. The former case was distinguished on four points:

> (1) Although the Municipal Attorneys' case permits executive sessions on the advice of counsel in certain specified instances, it does not abrogate the statutory requirement that minutes be kept and recorded; (2) An executive session of a public body is not permitted unless a majority of a quorum of the members present vote to hold an executive session; (3) Even if an executive session is properly held . . . the statute requires that any vote or action taken in an executive session must be in a public meeting with the vote of each member publicly cast and recorded; (4) Informal gatherings among a majority of the members to decide

[132] *Id.* at 475.
[133] *Id.* at 476.
[134] *Contra*, Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968).
[135] 611 P.2d 628 (Okla. 1980).
[136] *Id.* at 629.
[137] *Id.* at 632.
[138] *Id.* at 631.
[139] 577 P.2d 1310 (Okla. 1978).

> on any course of action or to vote on any matter is prohibited by the Act.[140]

The court added that: "It is not a proper function for the Board to abdicate its responsibility for decision-making to its attorney."[141]

The significance of this case appears to be its conclusion that the Act still applies to conferences between public bodies and their attorneys in that final voting is still to be in public and a public vote is required to initiate such a session. In addition, the court liberally interpreted section 306, which prohibits circumvention of the Act. The fourth distinction made by the court in the above quotation was not strictly applicable to the facts in *Berry*; no gathering of a *majority* of the board had taken place. The fact that this provision was cited demonstrates that the court is willing to interpret the Act liberally in order to eliminate practices such as the "informal" decision making evidenced in *Berry*.[142] This would seem to indicate further that the court's actions in carving out exceptions in the areas of quasi-judicial processes and "attorney-client conferences," *i.e.*, the *Stillwater*[143] and *Municipal Attorneys*[144] cases, respectively, is more a product of the importance given to the policy considerations in those isolated areas than to any hostility toward the aims of the Act.

Comparison with Federal Law

Comparison of provisions of the Oklahoma Open Meeting Act with the federal Government in the Sunshine Act [hereafter referred to as the "Sunshine Act"],[145] is instructive. Three reported cases interpreting the federal act held that the Sunshine Act was not applicable. Consideration of these cases under the Oklahoma Act would have required an opposite result.

Hunt v. Nuclear Regulatory Commission[146] was decided by the District Court for the Northern District of Oklahoma and thus has additional local interest. The case grew out of the proposed Black Fox nuclear power plant under construction near Tulsa. A citizens' group had pressed for release of a report on the steam supply system to be used as part of the proposed plant. The report was discussed in a closed meeting of the Atomic Safety and Licensing Board (ASLB), a subordinate entity of the Nuclear Regulatory Commission (NRC). The plaintiffs' suit to enjoin the closed session was not heard until after the meeting, but the court considered the suit on its merits,

[140] 611 P.2d 628, 632 (Okla. 1980). Two dissenting justices were of the opinion that the Act was totally inapplicable when executive sessions were properly held under the attorney-client privilege. *Id.* at 632-33.

[141] *Id.* at 632.

[142] Inexplicably the court invalidated the board's action without finding that the violation by the board was willful as required by section 313 of the Act.

[143] 534 P.2d 9 (Okla. 1975).

[144] 577 P.2d 1310 (Okla. 1978).

[145] 5 U.S.C. § 552b (1976).

[146] 468 F. Supp. 817 (N.D. Okla. 1979).

holding that the possibility of repeated controversy prevented the issue from being moot.[147] The court's decision, dictated by the clear language of the statute, was that the Sunshine Act did not apply.[148] This was because under the intertwining definitions used in the Sunshine Act, the meetings of the ASLB were not "meetings" at all.[149] Under the Sunshine Act, an "agency" is an agency headed by a collegial body, the majority of whom must be presidential appointees.[150] The NRC is an agency under this provision, but the ASLB is not. A "meeting" under the Sunshine Act is deliberations of members.[151] A "member" is a member of the collegial body.[152] Because the ASLB had no NRC "members," it did not hold "meetings" as the term is defined.[153] This result illustrates the wisdom of the Oklahoma Act's comprehensive definition of public bodies and, in particular, of the specification that committees and subcommittees are included therein.

Another federal case demonstrates the value of the Oklahoma Act's prohibition against circumvention.[154] The Court of Appeals for the District of Columbia was asked to review the refusal of the Federal Communications Commission to authorize a radio station to change its operating classification.[155] The FCC's decision had been reached by a process called a "notation process."[156] In this standard procedure, the FCC members received a memorandum listing proposed agenda items. Each member either expressed approval or disapproval of the proposed action or else requested discussion on the item in meeting. If no member requested discussion, the action was decided by the tally of approval and disapprovals received. The court found that congressional history showed a clear intent to approve the continuation of such processes and noted the efficiency afforded thereby.[157] Oklahoma's section 306 probably would be interpreted to prevent this procedure in Oklahoma.[158] One can question whether a great deal of time is saved by the notation process. Because the items involved are seen as requiring no discussion, they could be decided quickly in public sessions. Furthermore, one can also doubt whether the exigencies of the volume of matters to be decided are as severe in state agencies as in federal agencies. The unavailability of such a procedure in Oklahoma under the Act thus probably results in no substantial loss of efficiency and preserves the right of public access.

The third case under the Sunshine Act emphasizes the point that that

[147] *Id.* at 819-20.
[148] *Id.* at 822.
[149] *Id.* at 820.
[150] 5 U.S.C. § 552b(a)(1) (1976).
[151] 5 U.S.C. § 552b(a)(2) (1976).
[152] 5 U.S.C. § 552b(a)(3) (1976).
[153] 468 F. Supp. 817, 820 (N.D. Okla. 1979).
[154] 25 OKLA. STAT. § 306 (Supp. 1980).
[155] Communications Systems, Inc. v. FCC, 595 F.2d 797 (D.C. Cir. 1978).
[156] *Id.* at 798.
[157] *Id.* at 800-801.
[158] See text accompanying note 141, *supra*.

Act has no express provision for invalidation of actions taken in violation of its requirements[159] As noted earlier, the Oklahoma Act does have such a provision.[160]

On the other hand, the federal Sunshine Act also contains some provisions that might be beneficially incorporated into the Oklahoma Act. The notice provision of the Sunshine Act, for example, provides that the notice shall include, in addition to the time, place, and agenda of the meeting, the telephone number of a person designated by the agency to provide further information on the meeting.[161] Probably most public bodies in Oklahoma have staff members who could perform a similar service. The Sunshine Act also provides that the public shall have access to the transcript, tape, or minutes of closed meetings to the extent possible in keeping with the circumstances that required (or justified) the closed session.[162] In addition, the certification of a chief legal officer is required to authorize a closed meeting.[163] These provisions might help prevent abuse of executive sessions and would serve to maximize the public's access to information.

Finally, the Sunshine Act authorizes any citizen to bring an action for injunctive relief to enforce any provisions of the statute.[164] Injunctive relief would seem to be an appropriate addition to the remedies specifically provided by the Act. *Carl v. Board of Regents*[165] may indicate that the Oklahoma Supreme Court has already decided that injunctive relief is available even though it is not expressly authorized by the statute. The better choice would seem to be to include injunctive relief in the language of the Act. In this regard, a Florida court held that injunctive relief is constitutionally vested in the courts of that state and that the legislature was powerless to grant or to deny such authority by statute.[166] However, the court said that a statement purporting to grant such power would be construed as a declaration that violation of the statute was per se an irreparable injury, thus satisfying one of the requirements for granting injunctive relief without the necessity of proof.[167]

Other Suggested Amendments

In addition to the modifications suggested by comparison of the Act with the federal statute, other improvements in the Act should be considered. One of the most compelling problems that could be resolved by amendment

[159] Consolidated Aluminum Corp. v. Tennesee Valley Auth., 462 F. Supp. 464 (M.D. Tenn. 1978).

[160] See text accompanying note 82, *supra*.

[161] 5 U.S.C. § 552b(e)(1) (1976).

[162] 5 U.S.C. § 552b(f)(2) (1976).

[163] 5 U.S.C. § 552b(f)(1) (1976).

[164] 5 U.S.C. § 552b(h)(1) (1976).

[165] 577 P.2d 912 (Okla. 1978).

[166] Times Pub. Co. v. Williams, 222 So. 2d 470 (Fla. Dist. Ct. App. 1969).

[167] *Id.* at 476.

is the question of the meaning of "willful" and "willfully" as used in the remedial sections of the Act.[168] The meanings accorded the term "willful" span a wide spectrum; therefore, legislative guidance would be of great assistance to the courts.

Initially, it should be noted that the Oklahoma Criminal Code, Title 21 of the Oklahoma Statutes, defines the term for purposes of that title in section 92[169]: "The term 'willfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."[170] This definition represents one end of the spectrum.

The opposite end of the spectrum is represented by those instances in which "willful" is construed to mean malevolent, malicious, and with evil purpose. For example, an early Oklahoma case dealing with the term in regard to its use in a manslaughter statute held that the term meant "with evil intent or legal malice or without reasonable ground for believing the act to be lawful."[171] Other cases, in other contexts, have held the meaning of the term to include "premeditation, obstinancy, and intentional wrongdoing."[172]

The Court of Appeals for the Tenth Circuit summarized the usage of the various definitions in this manner:

> In some penal statutes the word willful means that the offense must be committed malevolently, with a bad purpose or an evil mind. These offenses ordinarily involve moral turpitude but in those statutes denouncing acts not in themselves wrong, such an evil purpose of criminal intent need not exist. It is sufficient if the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence.[173]

However, in going outside the area of criminal law where the statutory definition is not required to be used, it is difficult to predict whether the courts will lean toward the direction of a meaning equivalent to mere voluntariness or toward a meaning encompassing evil intent. *Shields v. State*[174] was a civil action for the removal of a county sheriff from office for neglect of

[168] Section 313 provides for invalidation of actions taken in willful violation of the Act; § 314 provides criminal sanctions for persons willfully violating the Act. In recent decisions the courts have been forced to provide their own definition of "willful." See Author's Note following the Conclusion for discussion of these cases.

[169] 21 OKLA. STAT. § 91 (1971) states that the definition in § 92 applies only to Title 21.

[170] 21 OKLA. STAT. § 92 (Supp. 1980).

[171] Miller v. State, 3 Okla. Crim. 575, 107 P. 948 (1910) (the court was quoting from earlier cases).

[172] U.S. Zinc Co. v. Ross, 87 Okla. 21, 23, 208 P. 805, 807 (1922); Wick v. Gunn, 66 Okla. 316, 317, 169 P. 1087 (1917) (the *Wick* case includes extensive discussion on the meanings of "willful.")

[173] Nabob Oil Co. v. United States, 190 F.2d 478, 480 (10th Cir. 1951).

[174] 184 Okla. 618, 89 P.2d 756 (1939).

duty. The court concluded, after extensive discussion, that the definition applicable in such actions should be one that required a showing of wrongful motive: "[A] willful neglect of duty means that the act or failure to act was for a bad or evil purpose. . . . [T]he officer . . . must be guilty of some conscious wrong or inexcusable carelessness or recklessness. . . . Mere thoughtless acts, with no bad or evil purpose . . . will not justify a removal."[175] On the other hand, the court more recently concluded that the criminal code definition[176] should be applied to "willfully" as used in a bail-jumping statute[177] even though it is outside the official scope of the statutory definition.[178]

These cases illustrate that confusion is invited because the statute is silent as to the intended meaning of this term. An amendment supplying guidance in this area is appropriate.

Several other improvements have been suggested throughout this note, many of which appear minor but that could prove to have significance. Section 306 of the Act, which prohibits circumvention of the requirements of the Act, should plainly include deliberations of a majority as well as actual decisions. Executive sessions for contract negotiations with representatives of employee groups should be available in dealing with public employees other than school employees. The right of access to minutes of executive sessions should be clarified, preferably by allowing access to such portions of the minutes as might be consistent with the purpose for which the meeting was closed.

More important, the invalidation remedy should be restricted so as to be available only on prompt complaint in the interest of insuring the reliability of governmental decisions. Injunctive relief should be made expressly available on the complaint of any citizen. Finally, in light of the attorney-client exception created by the court in *Municipal Attorneys*,[179] the legislature should affirmatively indicate its intent that the listed grounds for executive sessions are inclusive. Such an addition would also serve as an explicit rejection of the quasi-judicial exception created in *Stillwater*.[180]

Conclusion

The new Oklahoma Open Meeting Act represents a vast improvement over its predecessors. The Act seeks to realize the vital goal of making government accountable to the governed to the fullest extent practicable. It defines those groups whose meetings will be covered by the Act in very broad terms: committees, subcommittees, study groups, groups supported in whole

[175] *Id.*, 89 P.2d at 760, *quoting from* Phillips v. State, 75 Okla. 46, 181 P. 713 (1919).
[176] 21 OKLA. STAT. § 92 (Supp. 1980).
[177] 59 OKLA. STAT. § 1335 (Supp. 1980).
[178] Parrott v. State, 522 P.2d 635 (Okla. Cr. App. 1974).
[179] 577 P.2d 1310 (Okla. 1978).
[180] 534 P.2d 9 (Okla. 1975).

or in part by public funds, and so on. Compliance with the Act is sought to be achieved by potential invalidation of actions, by criminal penalties, and by prohibition of informal procedures designed to circumvent the Act.

In spite of the great effort that obviously was devoted to assuring compliance, the Supreme Court of Oklahoma has already ruled that the attorney-client privilege, under particular circumstances, is not covered by the Act; therefore, the possibility remains that the inclusiveness of the Act will be further eroded by subsequent judicial interpretation, including the possibility that the justices may continue to recognize an exception for quasi-judicial proceedings, which the court found under the former statute. As a consequence, the Act may need to be amended to be even more explicit. On the other hand, because the court responded to weighty considerations of policy as well as to subtleties of argument, the court's opinions may have found favor with many legislators. If, as a result, the legislature decides to let the Act stand as written, the public will still be well served: access to most government proceedings is now assured, and the court in its most recent interpretations of the Act has shown a tendency to broaden the scope of its provisions.

Author's Note: Oklahoma courts recently have decided four cases under the Act that relate to issues raised in this note. Probably the most important of these is *International Assoc. of Firefighters, Local 2479 v. Thorpe*,[181] in which the Oklahoma Supreme Court decided that the Act did not require that negotiations between the bargaining agent of the firefighters' union and a city manager be conducted in public. As discussed above, negotiations with agents representing groups of teachers are excluded from the Act's requirements by specific language, and compelling policy arguments can be advanced for broadening this exception.[182] The *Firefighters* case has done much more than that; this decision creates a significant exception to the Act and arguably reverses a policy judgment of the legislature in the process. In *Firefighters* the court unanimously held that the Act does not apply to "committees," "task forces," or "study groups" (terms specifically included in the definition of "public body" in section 304(a)(1)) that do not exercise decision-making power.[183] This reaffirmed the rule of *Sanders*, decided under the former statute.[184]

In deciding that the legislature did not intend to extend the coverage of the Act to groups not having decision-making power, Justice Doolin's opinion relied on legislative history. The house of representatives had rejected senate language that expressly included "advisory groups," *inter alia*, in the definition of "public body."[185] The court found this to be adequate evidence

[181] 52 OKLA. B.J. 1884 (Aug. 1, 1981).
[182] See text accompanying notes 66-71 *supra*.
[183] 52 OKLA. B.J. 1884, 1885 (Aug. 1, 1981).
[184] See text accompanying notes 96-99 *supra*.
[185] 52 OKLA. B.J. 1884, 1886 (Aug. 1, 1981).

of legislative intent to leave the *Sanders* rule untouched. Although the policy arguments for allowing private negotiations may be valid and persuasive, the approach taken in *Firefighters* is open to question.

The well-established rule is that a court resorts to statutory construction only to resolve ambiguities.[186] The edict of the Act is plainly not ambiguous—meetings of public bodies are to be public meetings. For what purpose, then, did the court inquire into the legislative history? No difficulty was perceived in defining terms; to the contrary, broad definitions were adopted to determine that the group composed of the city manager and the bargaining agent was included under the Act as a "committee," "task force," or "study group," even though it arguably did not fit the usual or traditional definition of any one of those terms.[187] In so holding, the justices echoed decisions of other states that called for liberal construction of statutes that were enacted for the public's benefit.[188] Yet the court proceeded to take away with one hand what it had given with the other, by deciding that the legislative history supported the affirmation of the *Sanders* rule. If a group is a public body, the Act clearly requires meetings of that group to be in public, unless within one of the limited exceptions. The legislative history might have been properly consulted had the problem been defined as an ambiguity in the meanings of terms such as "study group," but it was completely unnecessary after the court had found the group in question to be a public body.

Moreover, although some evidence of legislative intent is provided by the rejected language cited in the opinion, the inclusion of "study groups" in the definition of public body is also evidence of legislative intent. The term "study group" does not ordinarily connote a decision-making group.[189] Thus the attempt to fathom the purpose of the legislators may have frustrated rather than furthered their goals. The resurrected *Sanders* rule extends far beyond the area of collective bargaining and probably creates the largest single exception to the Act's coverage.

Each of the other three decisions[190] recently announced interprets the term "willful."[191] Although the language in the cases differs, the consensus clearly is that the term will be given a broad definition. The court of appeals said: "[W]e define the term 'willful' to include any act or omission which has

[186] Estate of Kasishke v. Oklahoma Tax Comm'n, 541 P.2d 848 (Okla. 1975); Johnson v. Ward, 541 P.2d 182 (Okla. 1975). *See also* Udall v. Udall, 613 P.2d 472 (Okla. 1980) ("Exceptions should not be read into a statute which are not made by the legislative body.").

[187] 52 OKLA. B.J. 1884, 1885 (Aug. 1, 1981).

[188] *Id.*

[189] "Study group" is defined as "a group of people joining in the study of a particular topic and usually meeting at scheduled intervals to discuss individual observations, reading, and research." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2269 (1976).

[190] Hilliary v. State, 630 P.2d 791 (Okla. Cr. App. 1981); Haworth Bd. of Educ. v. Havens, 52 OKLA. B.J. 1978 (Sept. 12, 1981) (petition for certiorari to Oklahoma Supreme Court was pending at time of publication); *In re* Appeal From Order Declaring Annexation, 52 OKLA. B.J. 1981 (Sept. 12, 1981) (petition for rehearing was pending at publication).

[191] See text accompanying notes 168-178 *supra*.